SUPREME COURT, U. S.

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No. 1015.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

NO. 3 BULL TOWING COMPANY et al.,
Petitioner,

vs.

MONSANTO CHEMICAL COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF

Of Respondent in Opposition to the Petition for Certiorari.

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TABLE OF CONTENTS.

	Page
Table of Cases	This page
Table of Authorities	This page
Opinions Below	1
Statement of Questions Presented	2
Argument	3
Conclusion	8

Table of Cases.

Luckenback v. W. J. McCahan Sugar Ref. Co., 248 U. S. 139, 63 L. ed. 170, 39 S. Ct. 53, 1 A. L. R. 1522 (1918) 6

Mahnick v. Southern S. S. Co., 321 U. S. 96, 88 L. ed. 561, 64 S. Ct. 455 (1944) 6, 7

Morales v. Galveston, 370 U. S. 165, 8 L. ed. 2d 412, 82 S. Ct. 1226 (1962) 5

McAllister v. United States, 348 U. S. 19, 75 S. Ct. 6, 99 L. ed. 20, 25 (1954) 7

No. 3 Bull Towing Company v. Monsanto Chemical Co., 326 F. 2d 18 (6th Cir. 1963) 1

The Wilderoft, 201 U. S. 378, 50 L. ed. 794, 26 S. Ct. 467 (1906) 6

West Tenn. Limestone Co. v. Federal Barge Lines, Inc., 288 F. 2d 663 (6th Cir. 1961) 7

Table of Authorities.

5 Moore's Federal Practice (2nd Ed.), Rule 52, page 2690 ..... 6, 7

Supreme Court Rule 19 (b) 8

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OPINIONS BELOW.

The Trial Court filed detailed Findings of Fact and Conclusions of Law which appear at pages 22a-36a of the Joint Appendix upon which a Final Decree was entered for Respondent (Libellant) App. 37a.

The Court of Appeals for the Sixth Circuit rendered a detailed opinion on December 18, 1963, in which it thoroughly reviewed the evidence, concurred in the Findings of Fact and Conclusions of Law of the Trial Court and affirmed the Final Decree. This opinion will be found at 326 F. 2d 18 (6th Cir. 1963) as well as in Petitioner's Appendix.

STATEMENT OF QUESTIONS PRESENTED

The Petitioner (hereinafter referred to as "Bull") presents three rather long and involved questions of fact which are claimed were improperly and incorrectly answered in favor of Respondent (hereinafter referred to as Monsanto) by the Trial Court as well as the Court of Appeals. Despite the conclusions that Petitioner attempts to draw from the statement of evidence he presents, he cannot escape the findings of fact drawn from the evidence by the Trial Court which were concurred in by the Court of Appeals.

ARGUMENT.

The questions presented by Petitioner are questions of fact. They revolve around the issue of the seaworthiness of the barge tendered by Petitioner to carry Respondent's mixed cargo of petroleum products.

These questions were all resolved affirmatively in favor of Respondent by the Trial Court (App. 22a-33a). These same questions were presented to the Court of Appeals by Petitioner. The Court of Appeals, in a lengthy review of the evidence, concurred in the Findings of Fact and Conclusions of Law of the Trial Court. 326 F. 2d 18 (6th Cir. 1963).

I.

The first question posed by Petitioner is purely hypothetical. It bears no relationship either to the Trial Court's findings of fact or to the conclusions of law which were entered. Basically, Petitioner interprets the findings below as holding that a carrier who supplies a seaworthy vessel and is not guilty of actionable negligence can be held liable for damage to a shipment in transit. Not only is it difficult to conceive of any legal grounds for such an interpretation, but it is impossible to draw such a conclusion from the Trial Court's holding. On the contrary, the Trial Court found:

(1) as a matter of fact, that the No. 5 starboard valve which controls the flow into and out of the No. 5 starboard tank failed to close properly and thereby permitted kerosene in the No. 5 tank to be pumped into the main header simultaneously with the ethyl gasoline (Finding 14, App. 29a);

(2) as a matter of law, that the vessel was unseaworthy due to the faulty condition of the No. 5 valve, which caused the contamination; and

(3) as a matter of law, that Petitioner failed satisfactorily to show that it did not breach its warranty

of seaworthiness concerning the barge by reason of the defective condition of the No. 5 valve (Conclusion 6, App. 35a).

There is ample evidence introduced to support the findings of fact, as stated by the Court of Appeals. This evidence, introduced by Petitioner, showed conclusively that the valve did not functio. properly because the threads were fouled with foreign matter. The Court of Appeals set this out succintly:

> "The Trial Court found that due to the malfunctioning of the valve, brought about by the cord being entwined around and in the threads of the valve, the barge was unseaworthy, and that its unseaworthy condition was the direct and proximate cause of the damages resulting to plaintiff (Monsanto) company from the contamination of the kerosene with the ethyl gasoline.
>
> "It is clear that the valve with the cotton cord in its threads did not operate properly. That is seen from the fact that it was leaking kerosene into the other petroleum products until Marion Warren, the mate of the tug, came aboard and succeeded in forcing it closed by jerking the valve wheel with all the force of which he was capable. *The valve did not properly seat with the ordinary force with which valves are closed. The barge was unseaworthy. With the cord intertwined in the threads of the valve, so that it would leak kerosene while the gasoline from other compartments was being pumped out through the shore hose, the barge was not reasonably fit for its intended use.* The duty to furnish a seaworthy vessel is absolute. Mitchell v. Trawler Racer, Inc., 362 U. S. 539" (Italics supplied).
>
> 326 F. 2d at page 20.

What Petitioner overlooks is that the unseaworthiness of the barge stems from the malfunction of the valve.

The fact that it would not seat properly when the ordinary force with which such valves are closed was applied was the unseaworthy cause of the contamination. This is an issue of fact resolved by the Trial Court against Petitioner.

II.

Petitioner's second question is whether or not a vessel is unseaworthy as a matter of law when a loss is not caused by the vessel but by the isolated and unforeseeable introduction of a foreign agent from without. Again Petitioner has attempted to set up a straw man, because the Trial Court simply did not hold that a vessel is unseaworthy as a matter of law under the circumstances postulated in the question. We submit that the one case cited by Petitioner to support this proposition, Morales v. Galveston, 370 U. S. 165, 8 L. Ed. 2d 412, 82 S. Ct. 1226 (1962), is totally inapposite because it deals with a personal injury problem and not damage to cargo, and is governed by a completely different framework of law. The case involved a longshoreman who was injured aboard a vessel by a chemical insecticide contained in the grain cargo being loaded. In other words, the Supreme Court did not hold that the vessel was unseaworthy; it simply held that the longshoreman was injured by the contaminated grain, not by the vessels' unseaworthiness.

The basic point in the instant case is that the vessel was unseaworthy as found by the Trial Court upon the facts. The Court of Appeals concurred in this result since, "with the cord intertwined in the threads of the valve, so that it would leak kerosene while the gasoline from other compartments was being pumped out through the shore hose, the barge was not reasonably fit for its intended use."

326 F. 2d at page 21.

The Trial Court, upon all the evidence presented, found as a fact, that the No. 5 starboard valve which controls the flow into and out of the No. 5 starboard tank failed to close properly and thereby permitted kerosene in the No. 5 tank to be pumped into the main header simultaneously with the ethyl gasoline (Finding 14, App. 29a).

The burden was then upon the Petitioner to explain away the presumption, inference or conclusion of unseaworthiness presented. No such evidence was introduced. In fact, the evidence which was introduced was an elaboration upon the unseaworthy condition of the barge since it was shown that the valve, which permitted the contamination, failed to close properly because of foreign matter, a cord, fouled in its threads keeping it from seating properly. There was no other explanation. Nor was there any proof as to when the cord was put there, by whom, for how long it had been there. Petitioner simply failed to carry his burden of proof, which has been ruled on twice, and he cannot be now heard to complain.

Under the "two-court" rule, this Court does "not, in admiralty, more than in other cases, review the concurrent findings of fact of two courts below."

Mahnick v. Southern S. S. Co., 321 U. S. 96, 88 L. Ed. 561, 64 S. Ct. 455 (1944);

Luckenback v. W. J. McCahan Sugar Ref. Co., 248 U. S. 139, 63 L. Ed. 170, 39 S. Ct. 53, 1 A. L. R. 1522 (1918);

The Wilderoft, 201 U. S. 378, 50 L. Ed. 794, 26 S. Ct. 467 (1906);

5 Moore's Federal Practice (2nd Ed.), Rule 52, page 2690.

A finding of unseaworthiness is a finding of fact.

Luckenback v. W. J. McCahan Sugar Ref. Co., 248 U. S. 139, 63 L. Ed. 170, 39 S. Ct. 53, 1 A. L. R. 1522 (1918).

The Petition for Certiorari does not show any clearly erroneous finding of fact, either by the Trial Court or by the Court of Appeals. His argument (pages 12-17) would be more appropriate before the Trial Court or the initial reviewing Court than the Supreme Court.

III.

Petitioner's third question is a rehash of a factual issue and primarily deals with the sufficiency of the evidence. We submit, again, that the "two-court" rule is binding on this factual decision.

Mahnick v. Southern S. S. Co., 321 U. S. 96, 88 L. ed. 561, 64 S. Ct. 455 (1944);

5 Moore's Federal Practice (2nd Ed.), Rule 52, page 2690.

Even in the Court of Appeals, a review of this factual question decided by the Trial Court is limited to "clearly erroneous" findings. This is too well decided to require numerous citations.

McAllister v. United States, 348 U. S. 19; 75 S. Ct. 6, 99 L. ed. 20, 24 (1954);

West Tenn. Limestone Co. v. Federal Barge Lines, Inc., 288 F. 2d 663 (6th Cir. 1961).

The Court of Appeals went into the question of proof of damages thoroughly and, after this review, affirmed the Trial Court's finding of fact.

> "We have come to the conclusion that the evidence supports the findings of fact of the Trial Court . . . it was for the Court to choose among the conflicting proofs of damage; and that its judgment should be affirmed upon its findings of fact and conclusions of law."

326 F. 2d at page 21.

CONCLUSION.

Petitioner apparently overlooks Rule 19 (b) of this Court for the Petition does not point out any conflict in decisions of different circuits; has not presented for review a Court of Appeals decision on an important question of Federal law which has not heretofore been decided by this Court; and has not presented for review, a Court of Appeals decision in conflict with applicable decisions of this Court. Neither has the Court of Appeals departed from the accepted and usual course of judicial proceedings.

Supreme Court Rule 19 (b).

It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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